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NO. 82-783

IN THE SUPREME COURT OF

THE UNITED STATES

OCTOBER TERM, 1982

STANLEY M. DIEFENTHAL AND
ELKA F. DIEFENTHAL,
Petitioners

VERSUS

THE CIVIL AERONAUTICS BOARD AND
CAB AND EASTERN AIRLINES, INC.,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OTHER AUTHORITIES:

14 C.F.R. §252

49 U.S.C. §1374(a)

49 U.S.C. §1374(b)

SUMMARY OF ARGUMENT

Petitioners, the Diefenthals, have asserted entitlement to Supreme Court review of the Fifth Circuit's decision in Diefenthal vs. Civil Aeronautics Board and Eastern Airlines, Inc., 681 F.2 1039 (5th Cir. 1982), on the grounds that that decision conflicts with Town of East Haven vs. Eastern Airlines, Inc., 282 F.Supp. 507 D.Conn. 1968), Fitzgerald vs. Pan American World Airways, 229 F.2d 499 (2d Cir. 1956), and Nader vs. Allegheny Airlines Inc., 512 F.2d 527 (D.C. Cir. 975). The cases relied upon by the Diefenthals, however, do not apply, and therefore do not conflict with the Fifth Circuit's decision in Diefenthal. First, those cases determined that there was and implied right of action to enforce a different section of the Federal case at bar. Secondly, all cases cited by the Supreme Court's landmark decision in

Cort vs. Ash, 422 U.S. 66 (1975). Accordingly, there is no conflict among the circuits. The Fifth Circuit's decision below was correct. The Diefenthals' Petition for a Writ of Certiorari should be denied.

ARGUMENT

As to respondent, Eastern Airlines, Inc.,[1] (Eastern) the Diefenthals have based their Petition for Writ of Certiorari upon the Fifth Circuit's affirmance of the trial court's determination that the Diefenthals do not have an implied private right of action to seek carrier compliance with CAB smoking/

1 As required by Supreme Court Rule 28.1, Eastern submits the following list of companion corporations: Terminal Sales Company, Eastern Airlines of Puerto Rico, Inc., Eastern Airlines, S.A., Dorado Beach Developments, Inc., Dorado Beach Estates, Inc.

non-smoking regulations. In support of their Petition, and as grounds for Supreme Court review, the Diefenthals contend that the Fifth Circuit's decision conflicts with other decisions in other federal appellate circuits. Supreme Court Rule 17.1(a).

The Diefenthals contend that they have a private right of action against Eastern under 14 C.F.R. §252 (1981). The CAB promulgated that regulation pursuant to a statutory grant of authority provided in the Federal Aviation Act, 49 U.S.C. §1374(a). While the Diefenthals concede that "Congress did not expressly create a private right of action under the Act," in support of their argument that a private right of action should be implied, the Diefenthals have cited three cases - all of which are based upon 49 U.S.C. §1374(b), and all of which were decided before the

Supreme Court's decision in Cort vs. Ash, 144 U.S. 66 (1975).

First, the Diefenthals have cited Town of East Haven vs. Eastern Airlines, Inc., 282 F.Supp. 507 (D.Conn. 1968). That case relied upon another case cited by the Diefenthals - Fitzgerald vs. Pan American Airlines, 229 F.2d 499 (2d Cir. 1956). As the Fifth Circuit explained in its opinion below, "Fitzgerald expressly relied on the common law presumption that the violation of a statute entitled the person harmed to enforce the statute." 681 F.2d 1050 n12. Both Fitzgerald and Town of East Haven found a private right of action under the anti-discriminatory section of the Federal Aviation Act, 49 U.S.C. §1374(b), which is not at issue in this case, based upon that common law presumption.

Finally, the Diefenthals have cited Nader vs. Allegheny Airlines Inc.,

512 F.2d 527 (D.Cir. 1975), 426 U.S. 290 (1975). In Nader, the Supreme Court held tht the doctrine of primary jurisdiction did not preclude a claim for common-law frandulent misrepresentation even when the claim also would be a violation of the "deceptive practice" proscription of §1374(b).

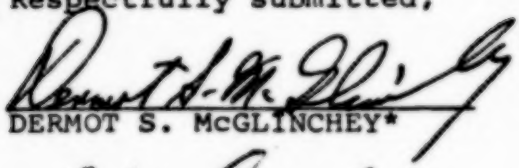
Moreover, after the above cases were decided, the Supreme Court issued its opinion in Cort vs. Ash. Cort vs. Ash overruled the above common-law presumption, and required detailed analysis on a case by case basis to determine whether an implied private right of action exists under a particular statute or regulation. The District Court and the Fifth Circuit followed that analysis. Their conclusions that the Diefenthals do not have a private rigth of action to enforce 14 C.F.R. §252 are consistent with Cort vs. Ash and

appellate cases decided thereafter. See e.g., Kodish vs. United Airlines, 628 F.2d 1301 (10th Cir. 1980), Caceres Agency vs. Transworld Airways, 594 F.2d 932 (2d Cir. 1979), Mason vs. Belieu, 543 F.2d 215 (D.C. Cir. 1976), Polansky vs. Transworld Airlines, 523 F.2d 332 (3rd Cir. 1975). The Diefenthals have cited no cases to the contrary, and their assertion that the Fifth Circuit's decision conflicts with decisions of other appellate courts is unfounded.

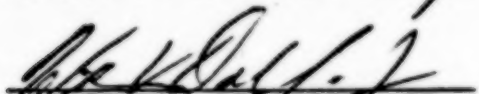
CONCLUSION

Based upon the foregoing grounds and authorities, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

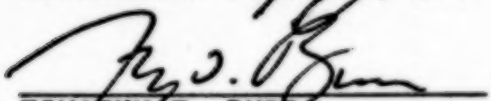
Respectfully submitted,



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CERTIFICATE OF SERVICE

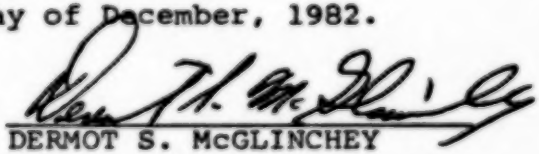
I hereby certify that I have deposited three copies of the above and foregoing Brief in Opposition to Petition for Writ of Certiorari in the United States mail, first class postage prepaid, and addressed to:

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